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No. 07-79

OCT 22 2007

IN THE

Supreme Court of the United States

AMIRI BARAKA,

Petitioner,

v.

JAMES E. MCGREEVEY, individually; JON CORZINE, in his official capacity as Governor of the State of New Jersey, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM D. MANNS
Nevada Court Mall
21-23 Court Street
Newark, NJ 07102
(973) 643-6596

ROBERT T. PICKETT
Counsel of Record
MICHAEL LESHER
80 Main Street, Suite 430
West Orange, NJ 07052
(973) 762-0613

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Respondents' Brief in Opposition does nothing to allay the concern expressed in Judge Nygaard's dissent that extending absolute legislative immunity to Governor McGreevey and Arts Council Chairperson Harrington for their campaign to oust petitioner Amiri Baraka from his poet laureate position "expands the legislative immunity privilege to insulate almost every action taken by executive branch officials having some connection, however remote, with the passage of legislative acts." Pet. App. 36a. Respondents point to no formal act taken by the Governor or Arts Council Chairperson that would qualify as *procedurally* legislative under this Court's precedents. They selectively describe circuit law so as to mask the degree of difference among the circuits regarding when an act is *substantively* legislative. The fact is, no other circuit court decision has gone so far as to grant a governor legislative immunity for an act other than signing or vetoing legislation.

Respondents' analytical confusion on the second question presented further buttresses the need for this Court to grant certiorari. Respondents perpetuate the court of appeals' error by insisting that *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980), "unambiguously holds that legislative immunity bars official capacity claims for injunctive relief," Opp. 18—in the face of explicit language in *Consumer Union* to the contrary. Certainly, the majority of circuits, in contrast to the Second, Third, and Eleventh Circuits, have not read *Consumers Union* to block lawsuits against government officials in their official capacities, seeking injunctive relief to prevent enforcement of unconstitutional laws. Respondents can claim there is no circuit split only by outright ignoring or discounting the many circuit court decisions that have squarely held that personal immunities, including legislative immunity, cannot be asserted in defense of an official-capacity lawsuit, which, in reality, is an action against the government entity, not the named officials.

ARGUMENT

I. Legislative Immunity for Respondents

A. Respondents contend that this Court need not review whether their conduct was procedurally legislative for purposes of legislative immunity because the Third Circuit correctly held that their actions leading to enactment of the statute eliminating Baraka's position as poet laureate were "unquestionably acts integral to the legislative process." Opp. 7.

Yet respondents concede that legislative immunity covers only those acts that are actually "part of the legislative process," not merely those acts that are "casually or incidentally related to legislative affairs." Opp. 8 (quoting *United States v. Brewster*, 408 U.S. 501, 516 (1972)). They agree with Baraka that this Court has extended legislative immunity only to formal legislative acts, such as voting for legislation or a resolution, preparing committee investigative reports, addressing a legislative committee or body, introducing a budget, and signing or vetoing legislation. *See* Opp. 9; Pet. 12. They admit that other types of political activities that may have some bearing on legislative affairs, but are not actually part of the legislative process—such as performing services for constituents, sending newsletters to constituents, issuing news releases, and delivering speeches outside the legislature—do not qualify for legislative immunity. Opp. 9.

From these agreed starting points, however, respondents make the unjustified leap that the Third Circuit correctly ruled that Governor McGreevey and Chairperson Harrington enjoy legislative immunity simply because Baraka's complaint alleged that McGreevey and his agents "orchestrated and directed" a campaign to terminate Baraka from his position as New Jersey poet laureate. *Id.* at 10; *see* 2d Am. Cmplt. ¶¶ 18-20 (R. 3). There is no basis for arguing from that simple allegation, which, consistent with basic rules of notice pleading, has not yet been fleshed out, that respondents engaged in formal acts that "were integral steps in the legislative process," *Bogan*

v. Scott-Harris, 523 U.S. 44, 55 (1998), comparable to the *Bogan* mayor's introducing a budget and signing it into law.

That the New Jersey governor has the authority to recommend measures to the Legislature, *see* Opp. 11, is irrelevant because, as Baraka has pointed out, *see* Pet. 15, without contradiction from respondents, Governor McGreevey did *not* carry out his campaign to remove Baraka through a formal message to the legislature recommending a legislative measure. Likewise, that the New Jersey governor has the authority to veto bills, *see* Opp. 11, does not render his every act leading up to the passage of legislation itself legislative. Without an allegation in the complaint supporting their contention that the Governor's actions were integral steps in the legislative process, respondents are forced to fall back on the Governor's signing the repealer bill into law, *id.* at 10, even though both here and in the lower courts, petitioner disavowed reliance on that act as a basis for his claim. *See* Pet. 8; Pet. App. 10a. Furthermore, respondents make no effort to explain what formal acts the Arts Council Chairperson could possibly have taken to entitle her to legislative immunity.

The complaint's allegations regarding McGreevey's and Harrington's "concerted campaign . . . to remove or terminate" Baraka, *see* 2d Am. Cmplt. ¶ 18, are better understood to protest respondents' *political* actions in instituting a drive to oust Baraka from his post—a campaign McGreevey instigated immediately after Baraka's reading of his controversial poem when he directed Harrington not to pay Baraka his authorized honorarium. *Id.* ¶ 17. As the dissent below rightly observed, "the central inquiry for non-legislators is whether the official was performing legislative functions." Pet. App. 41. The complaint is bereft of allegations supporting respondents' claim that they had performed such legislative functions.

B. Respondents also maintain that there is no need for this Court to review whether respondents' actions (and the New Jersey legislature's elimination of the poet laureate position itself) were substantively legislative. Opp. 12-16. Their

argument rests both on an effort to brush off the circuit split that has developed regarding the significance of a law's singling out a particular individual for differential treatment and on a misreading of *Bogan*. Although they contend that the repealer statute has prospective implications, respondents do not even try to dispute that the act, by taking effect during Baraka's tenure, rather than prospectively, singled out Baraka—and Baraka alone—for disciplinary action, as was the act's clear purpose. That the facts underlying the decision to abolish the poet laureate position were specific to Baraka and that the repealer treated Baraka differently from all other would-be poet laureates would have led the First, Fourth, Fifth, Sixth, and Ninth Circuits to hold that the elimination of his position was *not* a substantively legislative act. *See* Pet. 18-21.

Respondents attempt to minimize this disagreement among the circuits by making the question-begging assertion that the cases cited by petitioner involved "*administrative* actions taken against an individual, rather than the *legislative* action of elimination of a position." Opp. 15. But the termination of Baraka's position as poet laureate likewise was an administrative act. Unlike the Third Circuit, other circuits do not treat the legislative elimination of a position or other formally legislative activities as sacrosanct acts that can never be probed to determine whether they in fact bear "the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55. For example, respondents dismiss the First Circuit's decision in *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), with the notation that it involved "selective layoffs of particular employees." Opp. 15. But the First Circuit denied the mayor legislative immunity for laying off employees even though the mayor's layoff plan was ratified by the Assembly, which enacted an ordinance eliminating 102 positions. 204 F.3d at 5; *see also* Pet. 18. Similarly, here, McGreevey's directive to Harrington to withhold Baraka's honorarium was ratified when the New Jersey legislature abolished Baraka's position.

Respondents' partial quotation of a statement in *Alexander*

v. Holden, 66 F.3d 62 (4th Cir. 1995), *see* Opp. 15, displays the degree of hair-splitting they must undergo to negate a circuit conflict. The Fourth Circuit observed that "this case does not involve the elimination of a position through a Board's preparation of a budget ordinance, but rather the elimination of a particular position's salary, [and] the consolidation of that position with another." 66 F.3d at 67. For purposes of determining whether an act is substantively legislative, however, there is no difference between eliminating a position's salary and then combining that position with another, and simply abolishing the original position. As the court found in *Alexander*, "[b]oth the facts underlying the commissioners' decision and the impact of the commissioners' decision were specific, rather than general, in nature." *Id.*[1]

Respondents' argument that it is irrelevant whether the legislative purpose of the repealer statute was to terminate Baraka as poet laureate, *see* Opp. 16, misreads *Bogan*. If respondents are right that elimination of a position by statute is *always* a legislative and not an administrative act, then it would not matter, for purposes of legislative immunity, if the statute announced outright in its text—"whereas, because the people of New Jersey are gravely offended by Amiri Baraka's reading of his poem 'Somebody Blew Up America,' we hereby eliminate the position of Poet Laureate of New Jersey to ensure that Mr. Baraka's service as poet laureate is terminated forthwith." Nothing in *Bogan* suggests that such a forthright termination of

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[1] Similarly, in other contexts, circuits following the First Circuit's approach have emphasized the importance of whether an act singles out particular individuals for differential treatment. *See Bryan v. City of Madison*, 213 F.3d 267, 273-74 (5th Cir. 2000) (various vetoes and votes of mayor were administrative acts because they were based on specific facts and differently affected one property development); *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988) (remanding for assessment whether trustees' enactment of zoning ordinances was administrative or legislative, noting that actions singling out specifiable individuals for differential treatment would be administrative); *see also* Pet. 18-19.

a specified person from a state office would constitute a substantively legislative act. In *Bogan*, the city council eliminated 135 city positions (including the plaintiff's) as part of a budgetary package. 523 U.S. at 47. Here, a single position was eliminated, affecting the position's holder mid-term, with not even a pretense of a budgetary impact. In *Bogan*, the court of appeals had relied on particular legislators' subjective intent. *Id.* at 54; *see also Scott-Harris v. City of Fall River*, 134 F.3d 427, 438-39 (1st Cir. 1997) (lower court decision) (describing evidence of mayor's and particular councilors' motives). Here, no inquiry into legislators' subjective intent or motives is necessary. The purpose of the repealer statute is as clear from the accompanying legislative events and written legislative statements, *see* Pet. 4-7, as if the act had been crafted in the hypothetical language above—to remove Amiri Baraka from his post as poet laureate, a quintessentially *administrative* act.

II. Prospective Injunctive Relief in Official-Capacity Suits

Respondents' contention that there is no circuit split on the second question presented is inexplicable. They argue that petitioner has not cited a single case in which a circuit court has construed *Consumers Union* to hold that prospective legislative immunity does not bar claims seeking injunctive relief against government officials in their official capacities. Opp. 19-20. But respondents ignore the Eighth Circuit's decision in *Redwood Village Partnership v. Graham*, 26 F.3d 839 (8th Cir. 1994), cited in the Petition at 24. There, plaintiffs sued state agency officials for their promulgation of regulations. Discussing *Consumers Union*, the Eighth Circuit held that these officials had legislative immunity, but emphasized that "[t]he absolute immunity we confer upon the Department officials is for their conduct of rulemaking. Suits for declaratory and injunctive relief are still available to challenge regulations." *Id.* at 842. So, too, here: If respondents have legislative immunity, petitioner can still challenge the constitutionality of the repealer statute by seeking to enjoin its enforcement.

The Fifth Circuit likewise has held that legislative immunity does not "bar injunctive relief or suits in which officials are sued only in their official capacities and, therefore, cannot be held personally liable." *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134 (5th Cir. 1986).[2] Moreover, the rationales of the cases from several circuits cited in the Petition and dismissed by respondents because they involved other types of personal immunities, apply fully to legislative immunity. Such decisions, holding that absolute and qualified immunities are inapplicable in official-capacity suits, are in direct conflict with the decisions of the Second, Third, and Eleventh Circuits. *See* Pet. 23-24 & n.10 (citing cases). These decisions often rely on the clear statement in *Kentucky v. Graham*, 473 U.S. 159, 167 (1985), that "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess," which respondents brush aside as dicta. Opp. 20. Yet this Court repeatedly embraced this distinction between individual-capacity and official-capacity suits since *Graham* was decided. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 n.* (1996); *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *see also* Pet. 26 & n.11.

The four circuit cases cited by respondents (at 19) for the proposition that legislative immunity bars claims for prospective relief, at best, only deepen the circuit conflict, but in fact, they are inapposite because they do not address whether legislative immunity blocks official-capacity suits for injunctive

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[2] Respondents implicitly recognize *Minton*'s holding by speculating that the Fifth Circuit allegedly ignored *Consumers Union* because it had not resolved the issue of whether the defendants engaged in legislative or administrative actions. Opp. 20 n.5. But the Fifth Circuit's reason for finding legislative immunity unavailable was one that would apply regardless of the type of action defendants engaged in. *See Minton*, 803 F.2d at 134 ("official immunity doctrines" are premised on the concern that the threat of personal liability may deter government officials in conducting their offices and thus do not apply when officials are not threatened with personal liability).

relief. Indeed, two of them pre-date *Graham*. If anything, two of these cases support petitioner's side of the circuit split by drawing the precise distinction Baraka relies on here: between an action to enjoin or compel a legislative action itself (*e.g.*, voting for or vetoing a bill)—which Baraka does not seek—and an action to enjoin enforcement of the law once enacted—which Baraka does seek. *See Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (ruling that legislative immunity bars an injunction against the governor's use of a partial veto provision, but officials enforcing the laws created in the allegedly unconstitutional manner would be proper defendants); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 91 (1st Cir. 1983) (holding that legislative immunity barred enjoining Puerto Rico Senate activities while recognizing that a court had "the undeniable power . . . to enjoin the enforcement of acts passed by the legislature").

The distinction that these and other circuits have made between a lawsuit seeking to compel a legislator to cast a vote or to prevent a governor from exercising a veto, on the one hand, and an action against an official with enforcement authority to prevent the *enforcement* of (or to redress the consequences of) an unconstitutional law, on the other hand, is the same one that has eluded both the Third Circuit and respondents. *Consumers Union* did not "unambiguously hold[] that legislative immunity bars official capacity claims for injunctive relief." Opp. 18. It held that legislative immunity barred injunctive relief against the Virginia Supreme Court and its chief justice in the form of an order that they amend the Bar Code. 446 U.S. at 731-34; *see also* Pet. 27 & n.12 (discussing limits on court authority to compel legislative acts). The Court explained, however, that because the Virginia Court and its chief justice had independent enforcement authority, *id.* at 734-37, "prospective relief was properly awarded against the chief justice in his official capacity." *id.* at 737 n.16; *accord Graham*, 473 U.S. at 164 n.8 (Court held in *Consumers Union* that the chief justice in his official capacity could be enjoined

from enforcing the State Bar Code).

The situation here is exactly parallel: regardless of whether McGreevey and Harrington enjoy legislative immunity for campaigning to oust Baraka, they have independent enforcement authority and could properly be sued in their official capacities for prospective relief enjoining enforcement of the act abolishing the poet laureate position as applied to Baraka. Courts have the power to adjudicate the constitutionality of a legislative action in a suit to enjoin its enforcement. *E.g.*, *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (addressing lawfulness of actions by House of Representatives through suit against House Sergeant of Arms, who executed the warrant); *accord Powell v. McCormack*, 395 U.S. 486, 501-06 (1969); *see also* Pet. 23. Oddly, respondents seem to concede as much. *See* Opp. 22 ("Enforcement is not a legislative act and therefore is not subject to legislative immunity.").

Because Baraka seeks reinstatement to his position as poet laureate and not an order requiring the New Jersey legislature to re-enact the repealed law, respondents' final argument embracing the Third Circuit's view that affording relief to Baraka would require legislators to recast their votes, Opp. 21-23; Pet. App. 21a, misses the mark. Baraka did not even sue state legislators, in contrast to the suit against state senators in *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998), *cited in* Pet. App. 20a-21a. Respondents argue that if Baraka were to prevail on the merits, he could not secure reinstatement to his position because "there is no poet laureate position in existence" as a result of the enactment of the repealer statute. Opp. 23. Respondents' position that the judiciary would be incompetent to afford Baraka a remedy, if he prevailed in establishing that the statute was unconstitutional, is a curious one. It treats elimination of a state position as some sort of special case where the judiciary would be powerless to rectify the constitutional wrong. Respondents' logic suggests that courts are powerless to afford injunctive relief to redress a constitutional violation whenever

such relief runs counter to the previously expressed wishes of the legislature.[3] And yet, as this Court has recognized—

> it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

Kilbourn, 103 U.S. at 199 (citation omitted). If Baraka established the unconstitutionality of the statute as applied to him, the act's elimination of his position would be "null and void." There would be nothing anomalous, then, about a court ordering executive officials to reinstate him.

It critically important that the Court grant certiorari on the second question presented to clear up once and for all whether legislative immunity applies in an action against state officials sued in their official capacities.

CONCLUSION

The petition for certiorari should be granted.

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[3] Counterexamples are too numerous to be done justice here, but just to name a few—this Court has declared that the House of Representatives was without power to exclude Adam Clayton Powell from its membership, despite an earlier House resolution excluding Powell from his seat and declaring that seat vacant, *see Powell*, 395 U.S. 486; it has excised from the federal sentencing scheme the statutory provisions that make the Federal Sentencing Guidelines mandatory, *see United States v. Booker*, 543 U.S. 220 (2005); it has held state apportionment of congressional districts unconstitutional, *see Wesberry v. Sanders*, 376 U.S. 1 (1964), with the result that lower courts ordered their own reapportionments pending further legislative action, *see, e g., Roberts v. Babock*, 246 F. Supp. 396 (D. Mont. 1965); and in *Ex Parte Young*, 209 U.S. 123 (1908) itself, the Court held that a state attorney general could be enjoined from enforcing unconstitutional railroad rate provisions, even though the ruling presumably would leave in effect previous rates superseded by the legislature.

Respectfully submitted,

ROBERT T. PICKETT
Counsel of Record
MICHAEL LESHER
80 Main Street, Suite 430
West Orange, NJ 07052
(973) 762-0613

WILLIAM D. MANNS
Nevada Court Mall
21-23 Court Street
Newark, NJ 07102
(973) 643-6596

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

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